Guardianship/Third Party Custody

09/09/2009

In **A.J.L. v. D.A.L.**, 912 N.E.2d 866 (Ind. Ct. App. 2009), in a dissolution of marriage proceeding, the Court affirmed the trial court's award of custody of the children to Father's aunt and uncle (Aunt and Uncle). The children were born June 24, 1997, August 19, 1998, and May 31, 2002. Aunt and Uncle regularly assisted Mother and Father with the children by providing childcare which included having the children at their house for extended overnight stays. Father filed a pro se petition for dissolution on January 5, 2006. The children lived with Aunt and Uncle fifty percent of the time from January 2006 through February 2007 and sixty to seventy percent of the time from February 2007 to February 2008. During those periods, Aunt and Uncle provided the children with food, clothes, and medical care and attended to their educational needs. From 2006 to 2008, other family members also helped with childcare and medical care. During those periods, Mother had several different residences and lived with several different people, sometimes with several different adults at one time, and she did not always have utilities. The children spent some weekends and other periods of time with mother in 2006 and 2008. On May 9, 2008, Aunt and Uncle filed to intervene in the dissolution proceeding and filed for custody of the children. On December 12, 2008, the trial court entered its Decree of Dissolution awarding custody of the children to Aunt and Uncle. Mother appealed the custody award.

The trial court did not err when it concluded that Aunt and Uncle are the de facto custodians of the children. Id. at 871. The Court noted the extended times the children lived with Aunt and Uncle since January 2006, and that during those periods, (1) Aunt and Uncle provided for the children's food, and together with other family members, provided for the children's clothing and medical expenses; (2) Aunt and Uncle paid for babysitters they hired to watch the children when they were out; (3) Mother did not provide financial assistance; (4) when the children were with Mother, Aunt and Uncle occasionally provided food or other household items, paid one of Mother's utility bills, and occasionally gave Mother "a dab of money;" (5) Aunt met with the oldest child's teacher twenty-five to thirty times from February 2008 to May 2008, to address that child's failing grades; and (6) Uncle regularly helped the oldest child with his math homework. The Court found that the evidence was sufficient to show by clear and convincing evidence that the children resided with Aunt and Uncle a majority of the time for unspecified non-consecutive periods over the preceding two years and that Aunt and Uncle provided the basic necessities for the children during that period. Id. at 870.

Clear and convincing evidence shows that Mother voluntarily relinquished care and control of the children to Aunt and Uncle for significant periods of time starting in January 2006 and that the affections between the children and Aunt and Uncle were completely interwoven. Thus, the trial court did not abuse its discretion when it awarded custody of the children to Aunt and Uncle as de facto custodians. Id. at 875. The Court reviewed the best interest factors to be considered in determining custody as provided by IC 31-17-2-8 which

include "(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in [IC 31-17-2-8.5(b)];" and by IC 31-17-2-8.5(b) which provides the following additional factors to be considered: (1) the wishes of the child's de facto custodian, (2) the extent to which the child has been cared for, nurtured, and supported by the de facto custodian, (3) the intent of the child's parent in placing the child with the de facto custodian, (4) the circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to seek employment, work, or attend school; and the provision of IC 31-17-2-8.5(d): "The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child." Id. at 871. The Court quoted extensively from In Re L.L. & J.L., 745 N.E.2d 222 (Ind. Ct. App. 2001), referring to the quotation as "the standard of review in natural parent-third party custody disputes:"

> First, there is a presumption in all cases that the natural parent should have custody of his or her child. The third party bears the burden of overcoming this presumption by clear and cogent evidence. *Evidence sufficient to rebut the presumption may, but need not necessarily, consist of* the parent's present unfitness, or *past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child.* However, a general finding that it would be in the child's "best interest" to be placed in the third party's custody is not sufficient to rebut the presumption. If the presumption is rebutted, then the court engages in a general "best interests" analysis. The court may, but is not required to, be guided by the "best interests" factors listed in [IC] 31-14-13-2 [custody following paternity determination], [IC] 31-14-13-2.5 [custody following paternity determination, including defacto custodian], [IC] 31-17-2-8 [custody in dissolution], and [IC] 31-17-2-8.5 [custody in dissolution, including de facto custodian], if the proceeding is not one explicitly governed by those sections.
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> If a decision to leave or place custody of a child in a third party, rather than a parent, is to be based solely upon the child's "best interests," as opposed to a finding of parental unfitness, abandonment, or other wrongdoing, such interests should be specifically delineated, as well as be compelling and in the *"real and permanent"* interests of the child.

Id. at 230 (emphasis provided by the Court). A.J.L. at 871-72. The Court reviewed evidence which it found supported a finding that Mother voluntarily relinquished the children to Aunt and Uncle; and the children are bonded with Aunt and Uncle. Id. at 872-73.

Clear and convincing evidence supports the trial court's conclusion that Aunt and Uncle rebutted the presumption that Mother, as the natural parent, should have custody of the Children. Id. at 874. Citing to the statement in L.L. as quoted above, that "[e]vidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's ... past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child," the Court held that, here, (1) the evidence that Mother left the child in the care and control of Aunt and Uncle for long periods of time, that the children are bonded with Aunt and uncle, and the reasonable inferences from that evidence support the trial court's conclusion that Mother had voluntarily relinquished the child to Aunt and Uncle and the lives and affections of

the children and Aunt and Uncle are "completely interwoven;" (2) the evidence and reasonable inferences supporting the judgment do not positively require a conclusion different from that reached by the trial court; and (3) although the trial court did not specifically state that Aunt and Uncle met the burden to show that emotional bond by clear and convincing evidence, there is no indication that the trial court applied a lesser burden, and the Court assumed that the trial court found that the burden was met by clear and convincing evidence. Id. at 873-74.